IN THE

Supreme Court of the United States

October Term, 1967

No. 416

FLORENCE FLAST, ALBERT SHANKER, HELEN D. HENKIN, FRANK ABRAMS, C. IRVING DWORK, FLORINE LEVIN and HELEN L. BUTTENWIESER,

Appellants,

against

JOHN W. GARDNER, as Secretary of the Department of Health, Education and Welfare of the United States, and HAROLD HOWE, 2d, as Commissioner of Education of the United States,

Appellees.

On Appeal from the United States District Court for the Southern District of New York

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BRIEF OF *AMICI CURIAE*

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This brief is submitted, by consent of the parties, in behalf of the following national Jewish organizations:

American Jewish Committee
American Jewish Congress
B'nai Brith Anti-Defamation League
Central Conference of American Rabbis

Jewish War Veterans of the U.S.A.
National Council of Jewish Women
Rabbinical Assembly
Rabbinical Council of America
Union of American Hebrew Congregations
United Synagogue of America

and the following local Jewish Community Councils:

Albany Jewish Community Council
Atlanta Jewish Community Council
Baltimore Jewish Council
Jewish Community Council of Metropolitan Boston
Community Relations Council of Camden County, N.J.
Jewish Community Federation, Canton, Ohio
Cincinnati Jewish Community Relations Committee
Connecticut Jewish Community Relations Council
Jewish Community Council of Dayton
Jewish Community Council of Metropolitan Detroit
Jewish Community Council of Easton and Vicinity
Jewish Community Welfare Council, Erie, Pa.
Jewish Community Council of Essex County, New Jersey
Jewish Community Council of Flint, Mich.
Community Relations Committee of the Hartford (Conn.) Jewish Federation
Indiana Jewish Community Relations Council
Indianapolis Jewish Community Relations Council
Community Relations Committee of the Jewish-Federation Council of Greater Los Angeles
Milwaukee Jewish Council
Jewish Community Relations Council of Minnesota
New Haven Jewish Community Council
Norfolk Jewish Community Council
Jewish Community Relations Council for Alameda and Contra Costa Counties, Oakland, Calif.
Jewish Community Council of Paterson, N. J.
Jewish Community Relations Council of Greater Philadelphia

Jewish Community Relations Council, Pittsburgh
Jewish Community Council of St. Joseph County, Ind.
Jewish Community Relations Council of St. Louis
San Francisco Jewish Community Relations Council
Savannah Jewish Council
Community Relations Committee of the Jewish Community Council of Schenectady
Jewish Community Council of Springfield, Mass.
Syracuse Jewish Welfare Federation
Community Relations Committee of the Jewish Welfare Federation of Toledo
Jewish Community Council of Greater Washington
Jewish Federation of Waterbury
Community Relations Council of the Jewish Federation of Youngstown, Ohio

Each of these organizations is concerned with preservation of the security and constitutional rights of Jews in America through preservation of the security and constitutional rights of all Americans. They are committed to the belief that separation of church and state is the surest guaranty of religious liberty and has proved of inestimable value both to religion and to the community generally. Inasmuch as our brief is not addressed to the substantive issues in the litigation described below, it is essential to note that being a signatory to this brief is not to be construed as indicating support for the position of the plaintiffs in such litigation; the signatories are merely associating themselves in this brief with the position that judicial review is justified in this case.

Statement

This is a suit by a group of citizens and taxpayers of the United States against the Secretary of the Department of Health, Education and Welfare and the Commissioner of Education of the United States. It seeks to prevent the expenditure of Federal funds in a manner which, the plaintiffs contend, violates the religion clauses of the First Amendment to the United States Constitution. Specifically, the plaintiffs challenge these expenditures under the Elementary and Secondary Education Act of 1965, Public Law 89-10, 64 Stat. 1100, 20 U.S.C. secs. 241a-1, 821-27 (Supp. I, 1965), which benefit schools operated by sectarian institutions. These expenditures include the financing in whole or in part of instruction in reading, arithmetic and other subjects and for guidance in sectarian schools under Title I of the Act and the financing of the purchase of textbooks and instructional and library materials for use in such schools under Title II of the Act.

The defendant government officials moved to dismiss the complaint on the ground that plaintiffs do not have standing to bring this action. A special three-judge District Court, duly convened, sustained that motion by a vote of two to one. The case is now here on appeal, this Court having noted probable jurisdiction on October 16.

Question to Which this Brief is Addressed

Do citizens of the United States who pay taxes to the United States Government have standing to bring a suit in a Federal court to enjoin expenditures of Federal money in aid of sectarian schools, contrary to the provisions in the First Amendment to the United States Constitution, particularly those guaranteeing freedom of religion and prohibiting a religious establishment?

ARGUMENT

American citizens who pay taxes to the United States Government have standing to initiate action in the Federal courts challenging the use of Federal funds in aid of sectarian schools contrary to the clauses on religion in the First Amendment to the United States Constitution.

A. This Proceeding Raises an Important Constitutional Issue that Should be Resolved.

The Elementary and Secondary Education Act of 1965 establishes a number of programs to aid elementary and secondary education, primarily through the public schools of the various states. Two provisions, however, have been administered by Federal and local authorities as authorizing, if not mandating, aid to nonpublic schools, including those operated by sectarian institutions. Section 205(a)(2) of Title I states that programs under that Title designed to aid local public school agencies in providing programs for the education of children of low income families shall be approved only if they provide that,

> to the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency has made provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate. • • •

Section 203(a)(2) of Title II provides that states submitting plans for grants under that Title for the acquisition of school library resources, textbooks and other instructional materials shall provide for

> acquisition of library resources (which for the purposes of this Title means books, periodicals, documents, audio-visual materials and other related library materials), textbooks, and other printed and published instructional materials for the use of children and teachers in public and private elementary and secondary schools. • • •

The complaint herein alleges, and, as the case now stands, it is not denied, that the defendants have approved and will continue to approve programs entailing use of Federal funds "to be used to finance and aid, in whole or in part, instruction in reading, arithmetic and other subjects and for guidance in sectarian or religious schools" and to finance "the purchase of textbooks and instructional and library materials for use in religious and sectarian schools." The complaint further alleges that this use of Federal funds violates the First Amendment to the United States Constitution, which provides in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; • • •"

The constitutional issue thus raised is one of far-reaching practical importance. The 1965 Act, which culminated decades of agitation for Federal aid to local public education, made a beginning in what may well become a much larger program in the years to come. In doing so, it purported to solve the issue of aid to sectarian schools by providing for their inclusion in the various statutory programs.

There was wide recognition in Congress that this action raised substantial questions under the Free Exercise and Establishment Clauses of the First Amendment. Proponents of the Act urged that the Constitution does not bar use of tax funds to finance educational benefits for children attending schools operated by religious bodies. Opponents claimed that this "child benefit" theory was simply a circumvention of a constitutional principle of long standing barring use of government funds for support, direct or indirect, of religious schools for any purpose.

Enactment of the statute thus posed a constitutional issue of profound importance. Its resolution will shape the nature of Federal programs in aid of education for the foreseeable future. If the Court holds that the Constitution bars the use of Federal funds to finance the operation of schools maintained by religious bodies, Congress will be able to proceed in this important area without constant turmoil as to the share to be allotted to religious schools. If it holds otherwise, and thereafter determines just which forms of aid are permissible and which are not, Congress will be able to legislate accordingly. We submit, however, that it would be disastrous to leave the issue unresolved and open to constant political agitation and local conflict. Yet, that is what the Government here in effect urges.

B. Judicial Review Is an Integral Part of Our Constitutional System.

Judicial review of constitutional issues is an integral part of our judicial system. As de Tocqueville said well over a century ago, practically every political question in America sooner or later becomes a judicial question. De Tocqueville, DEMOCRACY IN AMERICA, chap. 6, *Judicial Power in the United States* (1835). As stated more recently by Professor Louis Jaffe (The Right to Judicial Review, 71 Harvard Law Review 401 (1957)): "* * * availability of judicial review is, in our system and under our tradition, the necessary premise of legal validity" (at 403). "The constitutional courts * * * are acknowledged architects and guarantors of the integrity of the legal system" (at 409).

This aspect of our political system has worked well for nearly 200 years. Particularly in the last 30 years, it has given new life and effectiveness to the great guarantees of the Bill of Rights. The rights of persons charged with crime, of minority groups denied equal protection of the laws, of dissident groups generally have been recognized and strengthened.

During the last three decades, litigation has come to be the expected, normal process of obtaining both interpretation and enforcement of Bill of Rights guarantees. Bill of Rights issues are now expected to be settled by litigation seeking ultimate resolution by this Court. Few now fear such litigation even when brought by unpopular groups seeking to disturb the *status quo*. That outmoded fear, which is the mainstay of the Government's case here, was

explicitly repudiated in *NAACP* v. *Button*, 371 U. S. 415 (1963), where this Court nullified the effort of a state to curtail litigation seeking enforcement of the Equal Protection Clause. Justice Brennan, speaking for the Court, said (at 430):

> * * * under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.

Justice Harlan, who dissented in that case, nevertheless agreed on the necessary role of such litigation in our constitutional system. He said (at 452-3):

> Freedom of expression embraces more than the right of an individual to speak his mind. It includes also his right to advocate and his right to join with his fellows in an effort to make that advocacy effective. [Citations omitted.] And just as it includes the right jointly to petition the legislature for redress of grievances [citation omitted], so it must include the right to join together for purposes of obtaining judicial redress. We have passed the point where litigation is regarded as an evil that must be avoided if some accommodation short of a lawsuit can possibly be worked out. Litigation is often the desirable and orderly way of resolving disputes of broad public significance, and of obtaining vindication of fundamental rights.

The principle that in a democracy there should be legal machinery by which the violation of a constitutional right may be redressed is an application of the even broader concept that we have a "government of laws" as contrasted with a "government of men." As Justice Jackson said, concurring in *Youngstown Sheet and Tube Company* v. *Sawyer*, 343 U. S. 579, 646 (1952), "* * * ours is a government of laws, not of men, and * * * we submit ourselves to

rulers only if under rules." The thought underlying this concept is that the conduct of all persons should be governed and controlled by rules of general applicability and not by the whims or caprices of a dictator or his underlings. This Court has referred to the "cardinal precept upon which the constitutional safeguards of personal liberty ultimately rests—that this shall be a government of laws—because to the precise extent that the mere will of an official or an official body is permitted to take the place of allowable official discretion or to supplant the standing law as a rule of human conduct, the government ceases to be one of laws and becomes an autocracy." *Jones* v. *Securities and Exchange Corporation,* 298 U. S. 1, 23-24 (1935).

Rules can fulfill their function of universal application only if there exists an *independent* authority which may be called upon to interpret them in cases where questions as to their meaning arise. Unless there is a method for obtaining legal review, under a rule of law, the constitutional provision in question will have in each case the meaning which the government body applying it chooses to give it. Various officials may well read the same rule in different ways depending on their personal views and outlooks.[1] Thus, we would have a system where the "man" rather than the "law" determines what a person may or may not do, or what is legal or illegal.

1. It should be remembered that the present suit challenges not only the Congressional decision to provide various forms of aid to children attending sectarian schools but also the manner in which that decision is being carried out by government officials. The complaint asserts that Congress intended that the Act would be administered without violating the principle of separation. Without judicial review, the only procedure for correction of unconstitutional administration of the Act would be the impractical process of detailed amendment of the Act by Congress as each new violation of its intent was called to its attention.

Judicial review provides a necessary safeguard against variant and even arbitrary or capricious interpretation and application of rules by whichever government official happens to be applying them. "The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied and whether the proceeding in which facts were adjudicated was conducted regularly. To that extent, the person asserting a right, whatever its source, should be entitled to the independent judgment of a court on the ultimate question of constitutionality." Mr. Justice Brandeis, concurring in *St. Joseph Stockyards Company* v. *United States,* 298 U. S. 38, 84 (1936).

It follows that the degree to which a given country is a government of laws rather than of men can be measured by the extent to which independent courts are available for the determination of what the law is and for review of the interpretation of the law by administrative officials. Hence, judicial review of administrative determinations in a country governed by laws is most vital and necessary.

The goal of a "government of laws" rather than "of men" has been acknowledged and applied in common law and equity. From the very beginnings of Anglo-American jurisprudence it has been a maxim of common law that "remedies for rights are ever favorably extended." 18 Vines' Abridgement 521, Coke on Littleton, 153a, b. Courts of equity have also followed the basic principle that wrongs must be remedied. "The maxim that equity will not suffer a wrong to be without remedy, is probably the most important of the principles which are addressed to the court or chancellor." 19 Am. Jur., Equity, Section 451.

The logical nexus between this maxim and the principle of "government of laws" is clear: Whenever a violation of the law which results in the negation of a legal right of one or more individuals remains without the possibility of redress, the principle of a government of laws has to that extent broken down, giving way to a government of men.

C. Permitting Suits by Taxpayers Is Necessary to Resolution of the Constitutional Issue Involved in this Case.

If appellants are not permitted to obtain judicial resolution of the constitutional issue here involved, there will be no such resolution. The government, which insists that appellants have no standing, offers no suggestion to the contrary.

It is true that alternative ways of obtaining judicial review of these issues have occasionally been suggested but they can hardly be taken seriously. This is illustrated by exchanges that took place at the Senate hearings in 1966 on a bill to provide judicial review in the area here involved (Hearings before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 89th Cong., 2d Sess. on S. 2097).

The views of the Department of Justice in opposition to the bill were presented by Assistant Attorney General John W. Douglas (pp. 75-102). Pressed by members of the Committee to indicate how, if at all, the constitutional issues arising out of Federal aid to education programs, which include parochial schools could be resolved in the courts, Mr. Douglas referred to two cases then pending

(83-84). One was a challenge of a "Headstart" program under the Economic Opportunity Act being conducted in a parochial school in Missouri. He assumed that there was no question as to standing in that case since the children were being forced to go to a parochial school to take advantage of the "Headstart" program. That case (*Allendoerfer* v. *Human Resources Corp.*, Circuit Court of Jackson County, Missouri) never reached a constitutional adjudication since the program originally challenged was for the summer of 1965 only and the Federal allotment had been spent by the time the case was filed. It was ultimately withdrawn.

The other case suggested by Mr. Douglas was one pending in a Federal Court in Michigan challenging the use of *state* funds for certain programs in sectarian schools. Manifestly, this suggests no way of challenging Federal programs. (In that case, a three-judge court ruled that it would abstain from deciding the case until the statute had been considered by the state courts. *O'Hare* v. *Detroit Board of Education,* order issued February 20, 1967, not officially reported (D.C., E.D., Mich., Civil Action No. 27899).)[2]

Other representatives of the Government who testified at these hearings suggested similarly remote possibilities of litigation. Thus, the statement submitted by Donald M.

2. It has been suggested that, since taxpayers' suits are permitted in most states and decisions in such suits are reviewable in this Court if they raise Federal questions, issues raised as to Federal appropriations can be resolved by analogy from whatever rulings on state programs may be obtained. This view that government officials will abandon programs they administer on the strength of rulings not applicable to them finds little support in history. The American people should not have to rely on such a doubtfully effective means of securing their rights.

Baker, General Counsel of the Office of Economic Opportunity, suggested (Hearings, *supra,* at 134):

> * * * Any member of a class of intended beneficiaries of a community action program would apparently have standing to raise first amendment questions if he claimed that as a condition of receiving benefits he was required to sacrifice his rights under that amendment, * * *

This suggestion applies to Free Exercise Clause cases but not to those arising under the No-Establishment Clause. Finally, Theodore Ellenbogen, Assistant General Counsel of the Department of Health, Education and Welfare, stated that a taxpayer would have standing to refuse to pay a tax if it was "earmarked, let us say, for a particular purpose * * *" (*Id.* at 29). The programs here involved, of course, are not funded by such earmarked taxes.

In this proceeding, the Government has not suggested any more likely procedures. It has virtually admitted that, if its position in this case is upheld, even the most direct financing of specific religious activities in plain violation of the No-Establishment Clause, could not be halted. We submit that that is not the way our constitutional system of checks and balances is supposed to operate. As stated by Senator Sam J. Ervin, Jr., in the hearings referred to above (*Id.* at 89):

> * * * when the Founding Fathers set up the Federal courts, the Supreme Court of the United States, and authorized Congress to set up the inferior courts, they authorized the existence of those courts in order that there might be a check against violations of the Constitution by Congress.

D. The 1965 Act Was Approved by Congress on the Assumption that Constitutional Issues Raised by Its Terms or Administration Would Be Judicially Resolved.

The doctrine of *Frothingham* v. *Mellon*, 262 U.S. 447 (1923), on which the Government principally relies, is not one of constitutional law but rather one of judicial policy adopted by this Court for reasons of administration. Senate Committee Hearings, *supra*, Statement of Professor Paul A. Freund, pp. 498-9. As such, it can and, we believe, should yield if it appears that Congress intended that judicial review of its action was both possible and desirable. We submit that Congress has manifested such an intent here and that that intent should not be frustrated.

One of the subjects that received much attention in Congress during the debates on the 1965 Act was the question of judicial review. This discussion arose because it was generally recognized that the very provisions of the bill challenged in this suit raised serious constitutional questions under the First Amendment. It was primarily because of those provisions that an effort was made in both the House and the Senate to add a specific authorization of judicial review to the bill.

During the debate, Congressman Emanuel Celler, Chairman of the House Judiciary Committee, read a statement explaining that an explicit provision authorizing judicial review was unnecessary since avenues of access to the courts would be available. He said (111 Cong. Rec. 5929-30 (1965)):

> There is no aspect of this bill which raises issues of any significance in the field of church and state that will not be subject to judicial review * * * State and federal law already makes available judicial remedies against executive action in practically every situation where a remedy could, as a constitutional matter, be provided * * *
>
> Unless there is a "case or controversy"; that is, unless the suit is justiciable, the Constitution forbids the Federal court from considering the matter. If the case is justiciable and a constitutional question is involved, like church and state, whether we accept or reject the amendment providing for review, the case will be [adjudicated] * * *
>
> This right to judicial review can be described and channeled by legislation, but the right already exists and does not need to be specifically mentioned in this legislation in order to make it available.

Congressman Celler's view was echoed by others. Thus, Congressman Charles E. Goodall, a member of the House Committee on Education and Labor which reported the bill, said, "The constitutional issue must be decided initially by each member of Congress to his own understanding and ultimately, if a proper case arises, by the Supreme Court * * *" (111 Cong. Rec. 5771). Congressman Leonard Farbstein said: "I believe, and have been informed by knowledgeable sources, that the bill is constitutionally correct * * * at worst it is a calculated risk that can be corrected by the courts if in error." (*Id.* at 5962.)

On this record, the action of the House in rejecting the proposed judicial review amendment by a vote of 154 to 204 (*Id.* at 5942-3) and its subsequent approval of the bill

without a judicial review provision was based on the assumption that the hotly disputed constitutional issues would be judicially resolved.

When the bill was sent to the floor of the Senate by the Senate Committee on Labor and Public Welfare, that Committee reported that it had rejected a judicial review provision at least partly because constitutional issues could be raised under general doctrines of judicial review as well as under several specific provisions in the Act permitting judicial review of certain rulings and activities of the Commissioner of Education. The Committee said (S. Rep. No. 146, 89th Cong., 1st Sess., p. 35):

> The committee considered carefully recommendations to it in testimony that an explicit provision be added to afford judicial review of the constitutionality of provisions of the act and of its administration. After consideration of all facets of the problems, it was the general view of the committee that in this legislation such a provision is unnecessary *in view of the developing state of the law on the subject.* The committee, in considering the matter, discussed the following factors: (1) Litigation raising analogous issues is presently pending before courts of at least one State, and could reach the U. S. Supreme Court. *In view of the recent Supreme Court decisions in the school prayer cases, which also rose in State courts, it would appear more likely than ever before that the issues under this act could similarly be tested.* (2) Since the determination of the Supreme Court against taxpayers' suits in *Massachusetts* v. *Mellon* (262 U. S. 447 (1923)), *there have been subsequent decisions which also suggest the possibility of a test in the Federal courts* of the provisions of this act in the absence of specific language. *Larson* v. *Domestic and Foreign*

> *Corporation* (337 U. S. 682, 689, 690 (1948)), was cited as an example. (3) The bill presently contains three specific and limited judicial review provisions, which parallel those in other Federal education legislation: section 211 of title I, section 206 of title II and section 509 of title V. It is possible that these issues can also be raised in suits brought by states against the Commissioner of Education under those provisions. (4) It is not the practice to insert broad judicial review clauses in Federal legislation, particularly as this might be construed as an invitation to multiplicity of time consuming suits which could bring to a temporary halt an enormous range of Federal activities. (Emphasis supplied.)

Persuaded by this Report, the Senate defeated the judicial review amendment sponsored by Senator Sam Ervin by a vote of 32 to 53 (111 Cong. Rec. 7345).

The portions of the Senate Report emphasized above are particularly significant. They plainly show acceptance of the concept that judicial enforcement of the Bill of Rights, and particularly of the First Amendment, has been, and should continue to be, expanded. The reference in the Report to "the developing state of the law on this subject" may be viewed as an invitation to this Court to hold that the *Frothingham* doctrine is inapplicable to the issues which it was known the new law would present.

E. This Court Has Recognized the Need to Grant Standing in Order to Insure Correction of Constitutional Violations.

This Court has made it plain that many considerations bear on whether it will confer upon a party the opportunity to present his claim in non-traditional litigation. As this Court said in *United States ex rel. Chapman* v. *Federal Power Commission,* 345 U. S. 153, 156 (1953), standing is a "complicated specialty of federal jurisdiction, the solution of whose problems is in any event *more or less determined by the specific circumstances of individual situations,* * * *" (Emphasis added.)

The decisions bear out this generalization. In *Barrows* v. *Jackson,* 346 U. S. 249 (1953), this Court pointed out that, although traditionally only a party whose rights had been directly infringed had standing to rely on a constitutional guarantee, this was not a rule dictated by any provision in the Constitution but was, rather, a rule of self-restraint. It said (at 257):

> Under the peculiar circumstances of this case, we believe the reasons which underlie our rule denying standing to raise another's rights, *which is only a rule of practice,* are outweighed by the need to protect the fundamental rights which would be denied by permitting the damages action to be maintained. (Emphasis supplied.)

It was there held, as to standing, that a white seller of property who breached a restrictive covenant by selling to non-Caucasians could rely on the Equal Protection Clause as a defense to a co-covenantor's damage claim. As the above quotation shows, this Court recognized that, if the defend-

ant was not allowed to do so, "fundamental rights * * * would be denied."

"Fundamental rights" likewise would have been denied in *NAACP* v. *Alabama,* 357 U. S. 449 (1958) if the N.A.A.C.P., which was resisting the efforts of the State of Alabama to compel it to disclose the names of its members, had been barred from asserting that the rights of its members to freedom of association under the Due Process Clause of the Fourteenth Amendment would be curtailed by such disclosure. This Court again made clear that rules normally limiting standing would not be permitted to prevent the assertion of a highly valued constitutional right, and that effective vindication would have been difficult if standing were denied. This Court said (at 459):

> The principle [of standing] is not disrespected where constitutional rights of persons who are not immediately before the Court *could not be effectively vindicated except through an appropriate representative before the Court.* (Emphasis added.)

In *Bantam Books* v. *Sullivan,* 372 U. S. 58 (1963), the plaintiff book publishers were allowed to assert the right to freedom of expression under circumstances where it was the distributors of the books, rather than the out-of-state publishers, who were threatened with prosecution under anti-obscenity legislation. Manifestly, a strict ruling as to standing would have limited assertion of this claim to the distributors. This Court, however, noted that the concept of "legal injury," which is the essence of standing, depends on many factors, not the least of which is the pragmatic one treated as decisive in the *Barrows* and *N.A.A.C.P.* cases, *supra*—that, if standing were denied, in all likelihood the

constitutional requirement would go unenforced. This Court said (at 64 n. 6):

> Finally, pragmatic considerations argue strongly for the standing of publishers in cases such as the present one. The distributor who is prevented from selling a few titles is not likely to sustain sufficient economic injury to induce him to seek judicial vindication of his rights. The publisher has the greater economic stake, because suppression of a particular book prevents him from recouping his investment in publishing it. Unless he is permitted to sue, infringements of freedom of the press may too often go unremedied. Cf. *N.A.A.C.P.* v. *Alabama ex rel. Patterson,* 357 U. S. 449, 459.

In *Griswold* v. *State of Connecticut,* 381 U. S. 479 (1965), this Court again recognized that if the right to sue were denied, it was likely that the substantive right would likewise be denied. Hence, two birth control counsellors were permitted to assert Due Process rights of their counsellees. The Court said (at 481):

> The rights of husband and wife, pressed here, are likely to be diluted or adversely affected unless those rights are considered in a suit involving those who have this kind of confidential relation to them.

These and other cases[3] bear out the opinion expressed in the Senate Committee Report on the 1965 Act, *supra,* that "the developing state of the law" on the subject of standing warrants a decision permitting this action. In each case, the right involved was so highly valued that its enforcement was insured by conferring standing on persons who had been injured in somewhat less than a specific, measurable

3. Notably, the cases upholding standing to raise questions concerning legislative apportionment: *Baker* v. *Carr,* 369 U. S. 186 (1962); *Wesberry* v. *Sanders,* 376 U. S. 1 (1964).

way. Underlying the cases is the proposition that it is not healthy, in a constitutional system of government, to tolerate unremedied constitutional violations affecting the democratic process. If the existing rules of procedure for enforcing a provision of the Constitution do not suffice, other rules will be developed.

In the cases above, it was found that the person who was directly injured by the violation, and who could therefore assert constitutional claims under the usual rules, was in fact unlikely, or not in a position, to do so. This was held to be sufficient ground for departure from the normal criteria of standing. Here, the argument against the appellants' standing is not that they are asserting the rights of others but that, though they may be injured, their individual injury is too small a fraction of the total injury to warrant standing. It is not and cannot be claimed that there is no injury. This would be equivalent to saying that violation of the Establishment Clause creates no injury and that the Establishment Clause is therefore a nullity. There is an injury. And, as in the cases cited above, it will go uncorrected unless this action is permitted since, as we have shown, no one else can raise the issue. That, we submit, is a sufficient basis for upholding appellants' standing.

This principle, we submit, has been given at least implicit application by this Court under the Establishment Clause. In *Engel* v. *Vitale,* 370 U. S. 421 (1962) and *Abington School District* v. *Schempp,* 374 U. S. 203 (1963), it was held that certain religious practices in public schools violated the Establishment Clause of the First Amendment. In *Engel,* the plaintiffs were suing as parents of children attending the affected schools. In *Schempp,* the plaintiffs included both parents and children. With respect to the

Establishment Clause, this Court specifically held that there was no need to show any restrictive effects on the children of the plaintiffs. It was sufficient that the practices had the effect of giving state support to religion. Thus, it said, in the *Engel* case (370 U. S. at 430):

> The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not.

As to the establishment aspect of those cases, it is difficult to see how the plaintiffs had any clearer standing than any other citizen or taxpayer. While the children were physically involved in the challenged practices, the injury caused by the violation of the Establishment Clause—government support of religion—did not affect them in their status as school children. Hence, their involvement was hardly more than that of any other citizen.

Justice Brennan addressed himself to the question of standing in his concurring opinion in the *Schempp* case, even though it had not been raised by the parties. He concluded (374 U. S. at 266, n. 30):

> * * * to deny him [a parent] standing either in his own right or on behalf of his child *might effectively foreclose judicial inquiry into serious breaches of the prohibitions of the First Amendment*—even though no special monetary injury could be shown * * * (Emphasis added.)

The large-scale financing of the operation of sectarian schools out of Federal tax monies is, we submit, a "serious breach of the prohibitions of the First Amendment," as to which judicial review should not be foreclosed.

F. Standing Should Not Be Denied Here on Any Theory of *De Minimis*.

The mainstay of the government's case here is *Frothingham* v. *Mellon*, 262 U. S. 447 (1923), in which this Court rejected a taxpayer's suit challenging a Federal appropriation, holding that the taxpayer's interest was too small to warrant his invoking the judicial process. We submit that the concept of *de minimis* has no application to cases of this kind.

More than twenty years ago, this Court gave pointed expression to the high place held by the guarantees of the First Amendment. In *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 639 (1943), it said:

> The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect.

A year later, in *Thomas* v. *Collins*, 323 U. S. 516, 530 (1944), this Court referred to "the preferred place given in our scheme of the great, the indispensable democratic freedoms secured by the First Amendment. * * *" See also *Kovacs* v. *Cooper*, 336 U. S. 77, 88 (1949). This "preferred place" cannot be effectively assured unless the road to judicial enforcement is kept open.

Stripped to its essentials, the *Frothingham* decision said to the plaintiff, in effect, "Since you are not hurt

financially by this appropriation to any significant extent, you lack standing to attack it." It is our contention that, where hurt to conscience by way of intrusion upon a constitutionally protected right is involved, it is immaterial how much or how little the plaintiffs may be injured monetarily.

The origins of the concept of separation in our constitutional system show that the amount of potential or actual pecuniary loss to the individual citizen is irrelevant to a determination of injury. Madison's *Memorial and Remonstrance Against Religious Assessments* of 1785, which articulated the philosophy that is instinct in the First Amendment, was a protest against any tax for religious purposes, no matter how small. He argued that "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever." Thus it was not the amount of the tax, but the compulsory exaction of *any* amount from a citizen to aid or support religious activity that the Founders plainly intended the First Amendment to proscribe.

The significance of this aspect of the Establishment Clause was recognized by this Court in its classic formulation of the meaning of the clause in *Everson* v. *Board of Education*, 330 U. S. 1, 15-16 (1947):

> The "establishment of religion" clause of the First Amendment means at least this: * * * No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may

> be called, or whatever form they may adopt to teach or practice religion.

If the Establishment Clause bars the imposition of "small" taxes, the courts must be open for enforcement of that bar.

This Court's decision in *Baker* v. *Carr*, 369 U. S. 186 (1962), shows that even a slight fractional injury can be the basis for standing to sue where fundamental democratic values are involved. There, the complaint alleged that the existing Tennessee legislative apportionment debased the votes of the plaintiffs, in violation of the Equal Protection Clause of the Fourteenth Amendment. No pecuniary injuries to the plaintiffs was claimed; the only injury was a slight fractional loss in the value of the plaintiffs' votes. It can hardly be imagined that this impairment of the votes of the individual plaintiffs would ever have any significant impact on the outcome of any election. Yet this Court found standing. It framed the issue in the following terms (at 204):

> Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing.

We submit that plaintiffs here plainly meet that test.

Another illustration of the precept that a citizen's power to enforce basic rights need not be restricted by the criterion of substantial damage is afforded by *Hawke* v. *Smith*, 253 U. S. 221 (1920). In that case, this Court held unanimously that a provision in the Ohio Constitution requiring a referendum on ratification of proposed amendments to

the Federal Constitution was in conflict with Article V of the Federal Constitution. The suit was instituted by a citizen taxpayer to enjoin allocation of public funds for a referendum on ratification of the proposed Eighteenth Amendment. Plaintiff's individual interest in the matter was certainly minimal; yet this Court had no difficulty with respect to his standing to sue.

Congress has also recognized the impropriety of putting a price label on the right to enforce fundamental constitutional guarantees. The general jurisdiction of Federal courts to entertain suits arising "under the Constitution, laws or treaties of the United States" under 28 U.S.C. 1331a, is limited to cases where the amount in controversy exceeds $10,000. Under Section 28 U.S.C. 1343, however, the District Courts are given jurisdiction, without regard to the amount in controversy, in suits to vindicate "any right or privilege of a citizen of the United States" or to enforce any provision or statute providing "for equal rights of citizens or of all persons within the jurisdiction of the United States." "A complaint which is so drawn as to seek redress for any wrong specified in 28 U.S.C.A. §1343 establishes * * * district court jurisdiction under the latter statute, regardless of the amount in controversy." *Agnew* v. *City of Compton,* 239 F. 2d at 229 (C.A. Cal.), *cert. den.,* 353 U. S. 959 (1957). Accord: *Walton* v. *City of Atlanta,* 181 F. 2d 693 (C.A. Ga.), *cert. den.,* 340 U. S. 823 (1950).

The fear has been expressed that, if suits by ordinary taxpayers were to be freely permitted on First Amendment grounds, an unmanageable flood of litigation would ensue. We submit that this fear is without substance. Almost

every state permits taxpayer suits to challenge alleged misappropriations of state funds. Yet state courts have not been inundated by taxpayer litigation. Nor has there been an uncontrollable wave of suits on First Amendment grounds by parents of school children merely because this Court permitted such actions in *Everson, Engel* and *Schempp, supra.* It is apparent that there are other deterrents, such as time and expense involved, that effectively limit the initiation of lawsuits. In any event, it would be a strange argument that the mere possibility of increased litigation should warrant denial of access to the courts by withholding from American citizens the standing to seek to enforce fundamental constitutional guarantees. Constitutional rights that may not be vindicated and protected are hollow rights.

Conclusion

It is respectfully submitted that it is in the public interest for the courts to accept jurisdiction and resolve disputed issues where there is an authentic controversy and a *bona fide* action on religious grounds, regardless of whether or not the plaintiff is able to prove any direct financial damage beyond that sustained by the average citizen or taxpayer. The decision below should therefore be reversed.

Respectfully submitted,

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